



DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[Docket No. OAG 175; AG Order No. 5536-2022]

Revisions to Approval of Civil Consent Decrees with State and Local Governmental Entities

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations of the Department of Justice (“Department”) to restore the traditional process regarding the approval procedures to be used when a civil action against a State or local governmental entity is to be resolved by consent decree.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Discussion

A. Overview

This rule implements the April 16, 2021 Memorandum of Attorney General Merrick B. Garland titled “Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities” (the “April 2021 Memorandum”), available at <https://www.justice.gov/ag/page/file/1387481/download>. Specifically, this rule withdraws the changes made to the Department’s regulations by the rule “Approval of Civil Consent Decrees

With State and Local Governmental Entities” published on December 28, 2020 (85 FR 84229).

The April 2021 Memorandum also specifically rescinded the Memorandum issued by former Attorney General Jefferson B. Sessions III, entitled “Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities” (November 7, 2018) (the “November 2018 Memorandum”).

In addition, for consistency with the April 2021 Memorandum, the Department will revise the changes made to the *Justice Manual* in 2020 in response to the November 2018 Memorandum.

B. Background - Previous Administration

The November 2018 Memorandum set forth principles to guide the development of consent decrees with State or local governmental entities, including limitations on the circumstances in which a consent decree with a State or local governmental entity may be appropriate, the substantive requirements for such consent decrees, internal notification requirements regarding the initiation of negotiations for consent decrees, and a requirement of review and approval of senior leadership of the Department before a consent decree is agreed to by the United States or submitted to the court for entry. Subsequently, conforming changes were made to the *Justice Manual* and to the Department’s regulations at 28 CFR 0.160. The revisions to § 0.160, codified at paragraphs (d)(6) and (e), were limited to amending the Department’s settlement authority regulations to require approval of the specified consent decrees by the Deputy Attorney General or the Associate Attorney General. See 85 FR 84229 (Dec. 28, 2020).

C. Current Administration

Upon further consideration, the Attorney General has determined to restore longstanding regulations, protocols, and practices by authorizing the Assistant Attorneys General of the litigating components generally to handle such approvals because they are the Department officials most familiar with and best able to assess each particular case.

Accordingly, this rule restores the regulatory provisions at 28 CFR 0.160 as they existed

prior to the revisions adopted on December 28, 2020.¹

The April 2021 Memorandum also noted that, pursuant to longstanding Department settlement authority regulations predating the changes discussed above, and still in effect, a settlement agreement or consent decree with a State or local governmental entity must be referred to the Deputy Attorney General or the Associate Attorney General for approval if the component head “is of the opinion that[,] because of a question of law or policy presented . . . or for any other reason, the proposed settlement should receive the personal attention of the Deputy Attorney General or the Associate Attorney General, as appropriate.” 28 CFR 0.160(d)(2).

II. Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b)(A), (d).

B. Regulatory Flexibility Act

A Regulatory Flexibility Analysis was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

C. Executive Orders 12866 and 13563 - Regulatory Review

This rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1, General Principles of Regulation.

¹ In addition to other changes made by the December 28, 2020, rule, that rule also corrected an existing drafting error by removing “or” at the end of 28 CFR 0.160(d)(1). That was a non-substantive change, and accordingly this final rule does not undo that technical correction.

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget. Executive Order 12866, sec. 3(d)(3).

D. Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

E. Executive Order 13132 - Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule only pertains to the internal delegation of the Attorney General’s litigation authority, regarding the authority of the Department’s litigation components for approval of consent decrees entered into by the Department. Therefore, in accordance with Executive Order 13132, “Federalism,” the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 et seq.

G. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act (CRA), 5 U.S.C. 804. This action pertains to agency management or personnel, and agency organization, procedure, or practice, and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a “rule” as that term is used in the CRA, 5 U.S.C.

804(3)(B), (C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

H. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. In § 0.160:

- a. Revise paragraphs (d)(4) and (5); and
- b. Remove paragraphs (d)(6) and (e).

The revisions read as follows:

§ 0.160 Offers that may be accepted by Assistant Attorneys General.

* * * * *

(d) * * *

(4) When the proposed settlement commits a department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek particular appropriation or budget authorization; or

(5) When the proposed settlement otherwise limits the discretion of a department or agency to make policy or managerial decisions committed to the department or agency by Congress or by the Constitution.

Dated: February 18, 2022.

Merrick B. Garland,
Attorney General.

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